No. 96-7901

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IN THE

Supreme Court of The United States

OCTOBER TERM, 1997

RICHARD F. TREST,

Petitioner,

VERSUS

BURL CAIN, WARDEN,
LOUISIANA STATE PENITNETIARY,

Respondent.

On Writ of Certiorari to the United States Court of Appeal for the Fifth Circuit

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BRIEF OF THE STATE OF MISSISSIPPI AND 3 STATES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether, despite the State's failure to raise the affirmative defense of procedural default at any stage in the federal habeas corpus proceedings, the court of appeals is required to raise the defense *sua sponte* and is foreclosed from reviewing the claim on the merits based upon its conclusion that the claim is procedurally defaulted?

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RICHARD F. TREST,

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BRIEF OF THE STATE OF MISSISSIPPI AND 6 STATES AS AMICI CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICI CURIAE

The amici States seek affirmance of the decision of the United States Court of Appeals for the Fifth Circuit in ***Trest v. Whitley***, 94 F.3d 1005 (5th Cir. 1996), which

has been granted review by the Court. The States now present their position in the interest of: 1) finality of state court judgments; 2) comity between the states; 3) principles of federalism; and, 4) furtherance of judicial economy.

SUMMARY OF ARGUMENT

The Court should extend the rule announced in ***Granberry v. Greer***, 481 U.S. 129 (1987), to allow federal habeas corpus courts, including courts of appeals, to raise, *sua sponte* if necessary, state procedural bars that would be dispositive of claims without having to remand for further state court proceedings. Such a rule would promote judicial economy and finality of state court judgments, as well as comity and federalism.

ARGUMENT

In ***Trest v. Whitley***, the Court of Appeals held that petitioner's claim relating to the validity of his prior Mississippi convictions to enhance his present Louisiana conviction was procedurally barred from consideration. The only thing unusual regarding this matter is that the Fifth Circuit raised the procedural bar to consideration of the claim *sua sponte*. The question being considered by this Court is whether Court of Appeals had the authority to raise the procedural bar *sua sponte*. The facts of this case are rather unusual in that it involves the application of a procedural bar present in one state to a case in a sister state.

Trest's troubles began in Mississippi when he was convicted by guilty plea for five counts of burglary in May 24, 1976. Trest was sentenced to serve four years

in the custody of the Mississippi Department of Correction on each of these convictions.[1] The trial court ordered that these five four year sentences were to be served concurrently. On July 13, 1978, after Trest had served only two years of his four year sentences, the trial court reopened the case and suspended the remainder of the four year sentences. Thus petitioner was released from prison in Mississippi after the service of little more than two years.

Under Mississippi law Trest had no right of appeal from his guilty pleas. MISS. CODE ANN. § 99-35-101 (1972), reads:

> Any person convicted of an offense in a circuit court may appeal to the supreme court, provided, however, *an appeal from the circuit court to the supreme court shall not be allowed in any case where the defendant enters a plea of guilty*.
>
> [Emphasis added.]

[1]Under Miss. Code Ann. §97-17-19 (1972)(repealed April 11, 1996), petitioner could have received ten (10) years on each of the counts of burglary. The trial court could have imposed the maximum sentence and ordered the sentences to be served consecutively.

The avenue available to Trest to challenge his convictions was by of filing a writ of error coram nobis with the trial court[2]. Trest did not file such a petition either during his time of confinement or after he was released from custody.

In 1984 the Mississippi Legislature enacted a comprehensive post-conviction collateral relief act that replaced the previous statutory error coram nobis method of post-conviction relief. *See* MISS. CODE ANN. § 99-39-1 *et seq.* (Supp. 1997). Included in this enactment was

[2]At the time of petitioner's guilty plea and incarceration the method of post-conviction review was by way of filing a writ of error coram nobis under the now repealed MISS. CODE ANN. §99-35-145.

a three year statute of limitations to the presentation of post-conviction claims. MISS. CODE ANN. §99-39-5 (2), reads:

> A motion for relief under this chapter shall be made within three (3) years after the time in which the prisoner's direct appeal is ruled upon by the Supreme Court of Mississippi or, in case no appeal is taken, within three (3) years after the time for taking an appeal from the judgment of conviction or sentence has expired, or *in case of a guilty plea, within three (3) years after entry of the judgment of conviction*. Excepted from this three-year statute of limitations are those cases in which the prisoner can demonstrate either that there has been an intervening decision of the Supreme Court of either the State of Mississippi or the United States which would have actually adversely affected the outcome of his conviction or sentence or that he has evidence, not reasonably discoverable at the time of trial, which is of such nature that it would be practically conclusive that had such been introduced at trial it would have caused a different result in the conviction or sentence. Likewise excepted are those cases in which the prisoner claims that his sentence has

> expired or his probation, parole or conditional release has been unlawfully revoked.
>
> [Emphasis added.]

This new post-conviction procedure went into effect on April 17, 1984. In interpreting this provision the Mississippi Supreme Court held that any convict that had been convicted prior to April 17, 1984, had three years from that date, or until April 17, 1997, to file a motion for post-conviction relief or be forever barred from filing a post-conviction motion. ***Odom v. State***, 483 So.2d 343 (Miss. 1986). Trest did not avail himself of the extension of time to file a challenge to his guilty pleas entered in 1976. Trest had eleven years in which to challenge his Mississippi convictions, but did not do so.

In 1979, the year after being released from his Mississippi convictions Trest was again involved with the

law. He was convicted of armed robbery in Louisiana and the prior Mississippi convictions were used to enhance his sentence as a multiple offender to 35 years without the benefit of parole. Even after his Louisiana conviction and sentence, Trest had from 1979 until 1987 to challenge his prior Mississippi convictions that formed the basis of his enhanced sentence. He did not do so.

Not until 1990, almost three years after the Mississippi statute of limitations expired did Trest choose to raise any claim regarding the Mississippi convictions. He then raised claims in Louisiana based on the failure to be informed of his right to appeal and the right to appointed counsel of appeal on the Mississippi.[3]

Prior to the decision in ***Trest***, the Fifth Circuit had

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[3]As pointed out above Trest had no right of appeal from his guilty pleas, thus no right to counsel on appeal for his Mississippi convictions.

been presented with a challenge to the application of Mississippi's three year statute of limitations in the context of habeas review. The Fifth Circuit found that Mississippi strictly enforces the three year statute of limitations found in §99-39-5. ***See Sones v. Hargett***, 61 F.3d 410 (5th Cir. 1995).[4]

The question then becomes whether or not the Court of Appeals has the authority to raise a procedural bar to a claim *sua sponte*. Amici States would submit that this Court has already given the federal courts direction in this regard. The Court has spoken to the issue in the context of exhaustion of state court remedies. ***Granberry v. Greer***, 481 U.S. 129 (1987). In

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[4]In only one limited type of claim is the three year statute of limitations disregarded. That is were the sentence imposed on a convict is more than the statutory maximum. In those cases the Supreme Court of Mississippi will allow the filing of a post-conviction motion notwithstanding the three year statute of limitations.

Granberry, the Court held that a federal court considering a habeas petition containing unexhausted issues should determine whether the "interest of justice would be better served by addressing the merits of the habeas petition or by requiring additional state proceedings before doing so." *Id.* at 136. The decision in *Granberry* came in the face of the failure of the state to raise a nonexhaustion issue. Likewise, the case at bar presents a case were the state has arguably failed to raise a procedural bar issue.

Amici States contend that the rule announced in *Granberry* rule should be extended to apply in the case of a procedural bar. A federal habeas court, including a federal court of appeals considering an appeal from the denial of a habeas petition, should be allowed to *sua sponte* raise a valid procedural bar to the consideration of

a claim if the interest of justice would be better served by addressing the claim on that ground rather than sending the case back for further consideration in the state courts. The Court of Appeals in this case, correctly recognized that the interest of finality, comity and federalism would best be served by holding that the claim was procedurally barred from consideration, because petitioner could not obtain relief from his Mississippi convictions. Because of its dealings with the laws of Mississippi, the Court of Appeals was fully aware that petitioner had forfeited his right to challenge his prior convictions in the State of Mississippi by refusing to attack those convictions within the time allowed under MISS. CODE ANN. §99-39-5.

This Court has spoken to the issue of raising procedural bars *sua sponte*. In ***Teague v. Lane***, 489 U.S. 288 (1989), this Court held that the petitioner had

never properly presented the claim in state court and held the claim barred:

> Our application of the procedural default rule here is consistent with ***Harris v. Reed***, 489 U.S. 255, 263, 109 S.Ct. 1038, 1043, 103 L.Ed.2d 308 (1989), which holds that a "procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar" (citations and internal quotations omitted). *The rule announced in* ***Harris v. Reed*** *assumes that a state court has had the opportunity to address a claim that is later raised in a federal habeas proceeding. It is simply inapplicable in a case such as this one, where the claim was never presented to the state courts. See id.*, at 268-270, 109 S.Ct., at 1046-1047 (O'CONNOR, J., concurring).
>
> 489 U.S. at 297-99. [Emphasis added.]

In ***Harris v. Reed***, 489 U.S. 255 (1989), decided the same day, the Court addressed the prerequisites for a procedural default to be recognized in federal habeas. In

this opinion the "plain statement" rule of ***Michigan v. Long***, 463 U.S. 103 (1983), was adopted as the determining factor whether a claim had been held to be procedurally defaulted by the state courts. However, in Justice O'Connor's concurring opinion we find the following language:

> A contrary rule would make no sense. It would require a "plain statement" indicating state reliance on a procedural bar where no state court was ever given the opportunity to pass on either the procedural posture or the merits of the constitutional claim. Moreover, dismissing such petitions for failure to exhaust state court remedies would often result in a game of judicial ping-pong between the state and federal courts, as the state prisoner returned to state court only to have the state procedural bar invoked against him. *See* ***Fay v. Noia***, 372 U.S. 391, 435, 83 S.Ct. 822, 847, 9 L.Ed.2d 837 (1963); ***Williams v. Brantley***, *supra*, at 1385-1386 ("We refuse to contribute further needless and delaying requirements to a procedure that already often results in shuttling prisoners back and forth between the state and federal courts

before any decision on the merits is ever reached"). Finally, such a rule would create an incentive to proceed immediately to federal court, bypassing state postconviction remedies entirely in the hope that the lack of a state court decision as to the applicability of the State's procedural bar would be treated as "ambiguity." Such a result would not only run counter to the decisions of this Court, *see* ***Rose***, *supra*, at 518-519, but would also frustrate the congressional purpose embodied in § 2254.

In sum, it is simply impossible to "[r]equir[e] a state court to be explicit in its reliance on a procedural default," *ante*, at 1044, where a claim raised on federal habeas has never been presented to the state courts at all. In such a context, federal courts quite properly look to, and apply, state procedural default rules in making the congressionally mandated determination whether adequate remedies are available in state court.

489 U.S. at 269-70.

Thus, both in ***Teague*** and ***Harris*** it was recognized that the federal courts could and should apply state procedural

bars *sua sponte* under certain circumstances. Thus it seems that the Court has already recognized that in some instances that the federal courts may impose state procedural default rules on habeas corpus review without the claim ever being raised in state court. This is a logical extension of the rule announced in ***Granberry*** regarding exhaustion.

This is same policy consideration was present in ***Castille v. Peoples***, 489 U.S. 346 (1989), where this Court was discussing the meaning of fair presentation of an issue to the state courts. The Court held:

> It follows from what we have said that it was error for the Court of Appeals to rest a conclusion of exhaustion upon respondent's presentation of his claims in petitions for allocatur. *The requisite exhaustion may nonetheless exist, of course, if it is clear that respondent's claims are now procedurally barred under Pennsylvania law. See, e.g.*, ***Engle v. Isaac***, 456 U.S. 107, 125-126, n. 28, 102

S.Ct. 1558, 1570-1571, n. 28, 71 L.Ed.2d 783 (1982); ***Teague v. Lane***, 489 U.S. 288, 297-298, 109 S.Ct. 1060, 1068, 103 L.Ed.2d 334 (1989). We leave that question for the Court of Appeals. The judgment of the Third Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

489 U.S. at 351-52. [Emphasis added.]

Thus it seems clear that a Court of Appeals is empowered to raise a procedural bar if it would be futile to send the case back to state court for a determination of whether a claim was exhausted or procedurally barred from consideration.

More recently in ***Gray v. Netherland***, ___ U.S. ___, 116 S.Ct. 2074, 135 L.Ed.2d 457, (1996), this Court held:

> *Petitioner's failure to raise his* ***Brady*** *claim in state court implicates the requirements in habeas of exhaustion and procedural default.* 28 U.S.C. § 2254(b) bars the granting of habeas corpus relief

> "unless it appears that the applicant has exhausted the remedies available in the courts of the State." Because "[t]his requirement ... refers only to remedies still available at the time of the federal petition," ***Engle v. Isaac***, 456 U.S. 107, 125, n. 28, 102 S.Ct. 1558, 1570, n. 28, 71 L.Ed.2d 783 (1982), *it is satisfied "if it is clear that [the habeas petitioner's] claims are now procedurally barred under [state] law,"* ***Castille v. Peoples***, 489 U.S. 346, 351, 109 S.Ct. 1056, 1060, 103 L.Ed.2d 380 (1989). However, the procedural bar which gives rise to exhaustion provides an independent and adequate state-law ground for the conviction and sentence, and thus prevents federal habeas corpus review of the defaulted claim, unless the petitioner can demonstrate cause and prejudice for the default. ***Teague v. Lane***, *supra*, at 298, 109 S.Ct., at 1068-1069; ***Isaac***, *supra*, at 125, n. 28, 129, 102 S.Ct., at 1570, n. 28, 1572; ***Wainwright v. Sykes***, 433 U.S. 72, 90-91, 97 S.Ct. 2497, 2508-2509, 53 L.Ed.2d 594 (1977).
>
> 116 S.Ct. at 2080. [Emphasis added.]

In the case at bar we have a claim that is technically exhausted because it would be found to be procedurally

barred by the Supreme Court of Mississippi. Thus the Court of Appeals was correct in holding that petitioner could not challenge his prior Mississippi convictions in the Mississippi courts because it would be held procedurally b d.

The challenge to the Louisiana enhanced sentence is thus procedurally barred because the underlying Mississippi convictions are not assailable in the Mississippi courts or the Louisiana courts. Louisiana was entitled to rely on these prior convictions to enhance his sentence for robbery.

While the Court of Appeals declined to address the claim in light of ***Custis v. United States***, 511 U.S. ___, 114 S.Ct. 1732, 128_L.Ed.2d 1732 (1994), the conclusion of this Court there is worth noting. The Court stated:

> We recognize, however, as did the Court of Appeals, *see* 988 F.2d, at 1363, that Custis, who is still "in custody" for purposes of his state convictions at the time of his federal sentencing under §924(e), may attack his state sentences in Maryland or through federal habeas review. ***See Maleng v. Cook***, 490 U.S. 488, 109 S.Ct. 1923, 104 L.Ed.2d 540 (1989). If Custis is successful in attacking these state sentences, he may then apply for a reopening of any federal sentence enhanced by the state sentences. We express no opinion on the appropriate disposition of such an application.

114 S.Ct. at 1739.

Trest is not still in custody under his Mississippi convictions. Trest entered his guilty pleas to these crimes over twenty years ago and has been barred from challenging these convictions for over ten years by MISS. CODE ANN. §99-39-5. Thus he cannot attack the prior convictions in the Mississippi courts. Further, in any federal habeas corpus petition attacking these Mississippi

guilty pleas the federal courts would be bound to recognize the fact that Trest has defaulted his right to attack his Mississippi convictions by failing to file the claims within the time period allowed. Thus, the Court of Appeals was avoiding a ping pong match between state and federal courts and for that matter between the courts of sister states. The Court of Appeals was fully capable and correctly determined the fact that the claim was procedurally barred from consideration due to petitioner's failure to attack the Mississippi convictions. Louisiana has the right to rely on the convictions imposed by the State of Mississippi or any other state for enhancement purposes without going behind the face of the conviction.[5]

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[5]There would be no problem with ***Custis*** as petitioner was admittedly represented by counsel during his Mississippi guilty pleas.

The Fifth Circuit clearly decided the interest of justice would be better served by addressing the claim raised in the habeas petition on appeal. By holding the claim was procedurally barred, the Court of Appeals was promoting judicial economy, the interest of federalism, comity and finality of state court judgments. It was correct in not requiring additional state proceedings before doing ruling on the case. Every case that this Court has decided that touches on this question gives the lower federal courts the right to impose a state procedural bar, *sua sponte* if necessary, and deny habeas corpus relief.

The Court should extend the rule announced in ***Granberry*** and alluded to in ***Teague, Harris*** and ***Castille***, to cases in which the Court of Appeals determines that it can quickly resolve a case by applying a state procedural

bar without requiring further state court action. The Courts of Appeal are clearly familiar with the procedural law within their circuits and are cognizant of the application of the procedural default rules of the states over which they have jurisdiction. Such an extension of the *Granberry* rule would not offend the Constitution or the rights of habeas petitioners.

The adoption of such a rule would promote the finality of state court judgments, comity, federalism and judicial economy.

CONCLUSION

For the above and foregoing reasons the amici states would submit that the decision of the Court of Appeals for the Fifth Circuit be affirmed.

Respectfully submitted,

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